

Supreme Court, U. S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. **78-1856**

ROLAND T. DORL,

Petitioner,

vs.

FOSTER WHEELER CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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On the Brief

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Counter-Statement of the Case

Respondent presents this counter-statement of the case because the statement of the case in petitioner's brief contains references to documents which are not part of the record. These documents are also referred to in that part of petitioner's brief in which his reasons for the granting of a writ of certiorari are set forth.

The two documents referred to by petitioner in his brief which are not part of the record relate to an application which petitioner apparently filed in 1974 in the United States District Court for the Southern District of New York seeking an order permitting the perpetuation of testimony and appointment of counsel. The first document is a letter to petitioner from the district court in New York regarding petitioner's application. This letter is designated as Appendix C in petitioner's brief. The other document is the opinion of the district court denying petitioner's 1974 application. This opinion is designated as Appendix D in petitioner's brief.

The above documents relating to petitioner's 1974 application which are referred to in his brief were not made a part of the record in this case while it was before the district court, and were never referred to by petitioner in his response to respondent's motion for summary judgment in 1978.

Thereafter, however, while this case was pending before the United States Court of Appeals for the Third Circuit, petitioner attempted to include in his Appendix a number of documents which were not made a part of the record in the district court including the two previously mentioned documents relating to his 1974 application for perpetuation of testimony and for appointment of counsel.

After reviewing the Appendix submitted by petitioner with his brief to the court of appeals, respondent filed a motion which sought, *inter alia*, an order striking from petitioner's Appendix, those documents which were not part of the record. On October 2, 1978, the court of appeals granted that part of respondent's motion relating to the improper documents and struck from petitioner's Appendix all documents which were not part of the record

in the case including the two documents relating to petitioner's 1974 application which are now contained in petitioner's brief as Appendix C and Appendix D. (A copy of the court of appeals' October 2, 1978 order is set forth in the Appendix hereto.)

Respondent respectfully submits that the inclusion of the aforementioned documents in petitioner's Appendix, and the numerous references to those documents and the 1974 proceedings in petitioner's brief, are improper and should be disregarded by the Court.

With respect to another inaccuracy in petitioner's statement of the case, contrary to petitioner's assertion, the district court did hold a hearing on respondent's motion for summary judgment. The hearing was held on April 5, 1978 at which time petitioner's then newly retained counsel, Arthur N. Martin, Jr., Esq., appeared. During the course of the hearing, petitioner's attorney requested additional time to brief the issues raised by respondent's motion. The court granted counsel's request and at the same time both parties agreed through their counsel with the court's suggestion that the motion be decided on the briefs without further oral argument. (See Letter-Opinion of the district court dated April 17, 1978, petitioner's Appendix B.)

Reasons Why Certiorari Should Be Denied

I. The Petition presents issues not raised before or considered by the court of appeals.

It is well settled that, absent extraordinary circumstances, this Court will not consider issues which have not previously been presented to or considered by the court of appeals. *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967), rehearing denied, 386 U.S. 1027 (1967); and *Adickes v. S. H. Kress and Co.*, 398 U.S. 144, 147 n.2 (1970).

Nor will this Court, absent extraordinary circumstances, consider issues which, although presented to the court of appeals, were not considered by the appellate court in reaching its decision. *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 163, 164 (1975); *Ramsey v. United Mine Workers of America*, 401 U.S. 302, 312 (1971).

In this case, two of the four issues presented to the Court for review were neither raised nor considered by the court of appeals. These issues are:

(1) Whether petitioner's 1974 application for counsel and perpetuation of testimony tolled the running of the statute of limitations governing actions under the Age Discrimination in Employment Act (Question 2, petitioner's brief, page 3); and

(2) Whether respondent acted improperly in raising a defense of statute of limitations after two years of discovery (Question 3, petitioner's brief, page 3).

A third issue, relating to the question of whether the district court applied the correct statute of limitations in

dismissing petitioner's race discrimination action under 42 U.S.C. §1981, (Question 4, petitioner's brief, page 3), was presented to the court of appeals, but was not considered by that court in the course of reaching its decision affirming the district court's dismissal of petitioner's action.¹

Accordingly, in the absence of any extraordinary circumstances which might warrant a departure from the Court's general rule of not considering issues which were not presented to or considered by the court below, respondent urges that review of those issues set forth in petitioner's brief which were not considered by the court of appeals be denied.

II. The Petition does not present any issue which warrants review by this Court.

A. Petitioner's first question—the propriety of the court of appeals' decision

The first question presented by petitioner to the court asks:

"On appeal from summary judgment, did the Court of Appeals violate the remedial provisions underlying Title VII, the Age Discrimination in Employment Act (ADEA) and 42 U.S.C. 1981, the dictates of due process; as well as violate Appellate Court duty by deciding the merits of a *pro-se* litigant's discrimination and reprisal claims when the District Court did not resolve those issues, and when no evidence was before the Appellate Court justifying denial?" (Petitioner's brief, pages 1-2)

¹ See the court of appeals' opinion which is set forth in petitioner's brief as Appendix A, specifically page A3.

The thrust of petitioner's argument is that this Court should review the court of appeals' decision because petitioner believes that the court below erred and violated petitioner's constitutional right to due process by resolving genuine issues of material fact which had not been decided by the district court. Petitioner argues that any attempt by an appellate court to resolve issues of fact is improper and constitutes an extreme departure from accepted and usual standards governing appellate review.

Petitioner's argument is specious because it is predicated upon the false assumptions that genuine issues of material fact existed and that the court of appeals "decided" such issues of fact. To the contrary, the record shows that the district court, after analyzing all of the evidence in the record before it, *found that there were no genuine issues of material fact*. The district court specifically noted in its opinion that none of the material factual allegations set forth in petitioner's Complaint were disputed by defendant. The court went on to find that even if all of petitioner's *undisputed* factual allegations were accepted as true, they failed to support plaintiff's discrimination claims.

On appeal from the district court's decision granting summary judgment to respondent, the court of appeals was required to apply the same standards under Rule 56 of the Federal Rules of Civil Procedure in reviewing the record in this case as the district court had applied. *Klinge v. Lutheran Charities Assn. of St. Louis*, 523 F.2d 56, 61, 62 (8th Cir. 1975); and *Wagner v. Sea-Land Service, Inc.*, 486 F.2d 955, 960 (5th Cir. 1973).

The court of appeals reviewed the record and affirmed the district court's ruling that no genuine issues of material fact existed as to any of petitioner's discrimination claims and that petitioner's undisputed factual allegations,

taken together with the undisputed facts on the record, failed to support his discrimination claims.²

Thus, neither the district court nor the court of appeals resolved any genuine issues of material fact. Rather, both courts agreed that no such genuine issues of material fact existed in the case. There is no basis, then, for petitioner's contention that the court of appeals acted improperly in reviewing the district court's decision and affirming the dismissal of petitioner's case.

B. Even if the issues which were not considered by the court below were properly presented by petitioner to this Court, they would not warrant review.

An examination of the other issues presented by petitioner to this Court reveals that even if they had been considered by the court of appeals and properly presented to this Court, they would not warrant review.

With respect to the issue of whether petitioner's 1974 application for counsel and for perpetuation of testimony tolled the running of the statute of limitations under the Age Discrimination in Employment Act (Question 2, petitioner's brief, page 3), review is not warranted because none of the facts relied upon in support of petitioner's substantive argument are part of the record in this case.

As previously mentioned in respondent's counter-statement of the case, the documents referred to by petitioner

² In its opinion, the court of appeals specifically mentioned plaintiff's retaliation claim and noted that the depositions and affidavits filed by respondent, which were unchallenged by petitioner, showed that there was no basis for plaintiff's claim (petitioner's Appendix A at A2).

in connection with this issue (Appendix C and Appendix D in petitioner's brief) were never made a part of the record before the district court. In addition, when petitioner attempted to bring these and other documents before the court of appeals, they were stricken by that court precisely because they were not part of the record in the case. Because the facts asserted by petitioner in support of his argument on this issue are not part of the record, review of the question is not warranted.

With respect to the issue of whether equitable considerations and Rule 1 of the Federal Rules of Civil Procedure bar a defendant from raising a defense of statute of limitations after two years of discovery (Question 3, petitioner's brief, page 3), petitioner cites no legal support for his position. In addition, it was because of a lack of cooperation by petitioner that respondent was required to devote two years to various discovery proceedings in order to obtain the facts upon which its statute of limitations defense was based. For these reasons, this issue is frivolous and would not warrant review by this Court even if the court of appeals had previously considered it.

Finally, as to the issue of whether the district court applied the proper statute of limitations in ruling that petitioner's race discrimination claim under 42 U.S.C. §1981 was untimely (Question 4, petitioner's brief, page 3), review is not warranted because it is not the type of issue which would normally warrant review by this Court. Petitioner cannot argue that there is a conflict with the decisions of other courts of appeal on the same matter because the Third Circuit Court of Appeals did not pass upon the issue in this case. Nor does this issue relate to an important question of federal law which has not been, but should be settled by the Supreme Court. This Court has already addressed the issue in *Runyon v. McCrary*,

427 U.S. 160 (1976). In that case, this Court reiterated the general principle that the federal courts should apply the most analogous state statute of limitations to determine whether actions brought under 42 U.S.C. §1981 are timely.

Further, in the *Runyon* decision, the Court affirmed the application of Virginia's three-year statute of limitations governing actions for personal injuries to a claim by plaintiffs for damages under 42 U.S.C. §1981. In this case, the district court followed the *Runyon* decision and correctly applied New Jersey's two-year statute of limitations governing the actions for personal injuries (N.J.S.A. 2A:14-2) to plaintiff's claim for damages under §1981.

Finally, there is no contention by the petitioner that the district court's ruling on petitioner's §1981 claim constituted a departure from the accepted and usual course of judicial proceedings. In light of the above facts, this issue does not warrant review by this Court.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

VINCENT J. APRUZZESE

RICHARD C. MARIANI

APRUZZESE & McDERMOTT

A Professional Corporation

Attorneys for Respondent

Dated: Springfield, New Jersey
July 31, 1979

APPENDIX

Order of the United States Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

September 18, 1978

No. 78-1836

DORL, R. T.

vs.

FOSTER WHEELER CORP.,

Roland Dorl, Appellant

(D. C. Civil No. 76-0857)

Present: ROSENN and WEIS, Circuit Judges.

1. Appellee's Motion to Dismiss Appeal pursuant to Rule 21(3) of the Local Rules and Rules 7, 28 and 30, F.R.A.P. or, in the alternative, for an order:

- a. Striking portions of appellant's Appendix containing materials which are not part of the record in violation of Rule 30, F.R.A.P.;
- b. Striking portions of appellant's Brief which rely upon or refer to, documents contained in appellant's Appendix which are not part of the record in this case;

[1a]

Order of the United States Court of Appeals

- c. Striking portions of appellant's Brief which do not comply with Rule 21(1)(A)(e)(i) of the Local Rules of this Court;
- d. Directing appellant to prepare and file with this Court a new Joint Appendix and Brief which comply with Rules 28 and 30, F.R.A.P. and Rule 21 of the Local Rules;
- e. Requiring appellant to file with the Clerk of the District Court of New Jersey a bond for costs on appeal as required by Rule 7, F.R.A.P. in the sum or value of not less than \$1,000.00;
- f. Extending time for serving and filing appellee's Brief until thirty (30) days from date appellant competes last act required by this Court in connection with this motion;

with Memorandum in support of motion in which it states that this Court dismiss the appeal with costs to the appellee,

2. Appellant's motion for an order barring dismissal of appeal, etc., *with* Affidavit and Memorandum of Law in opposition to appellee's motion to dismiss appeal; and in support of appellant's cross-motion, etc.

in the above listed for Thursday, September 28, 1978, or as the Court decides.

Respectfully,

THOMAS F. QUINN
Clerk

enc.
FM:alf

Order of the United States Court of Appeals

P.S. The Clerk's order of 9-13-78 granted appellant leave to file Answer out of time.

The foregoing Motion to dismiss the appeal is denied. The alternative motion will be granted in part and Exhibits F 1-3, H 3, K 2, L, Q 1, R, U 9, W and Y1-7 will be stricken from the appendix. In all other respects the alternative motion will be denied, without prejudice to appellee's right to apply to the district court of New Jersey to require appellant to file a bond for costs on appeal as required by Rule 7, F.R.A.P.

By the court,

s/ MAX ROSENN
Judge

Dated: October 2, 1978